

G S GROUP

CLAIMS DEFENSIBILITY SEMINAR

HOW GOOD IS YOUR DEFENCE?

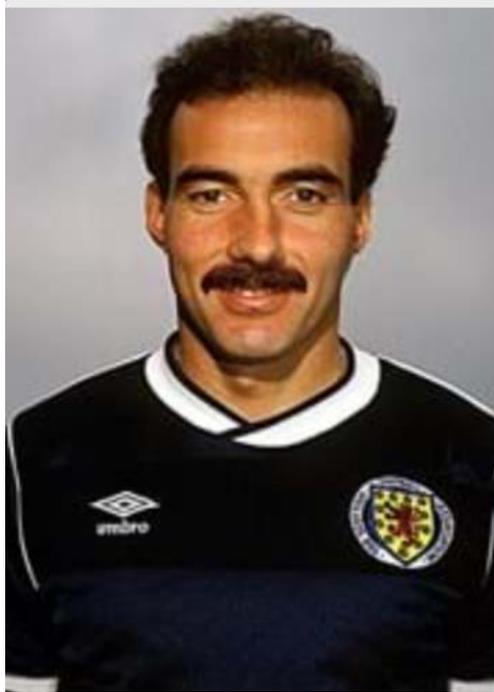
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# A GREAT DEFENCE



WILLIE MILLER



ALAN HANSEN



# INCIDENT SCENARIO ONE

Two young boys aged 11 and 13 are trespassing in a working rail yard. They decide to climb on top of a stationary wagon sitting in the yard and in doing so they accidentally come in to contact with the live current from the overhead line carrying 25,000 volts. The older boy sustained serious injuries while the younger boy received minor burns

Show of hands – are the railway operators liable?



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Show of hands – are the railway operators liable? **YES**

The area in question was beside a disused signalling box which was known to be frequented by local youngsters. Because of this knowledge of unauthorised use the rail company should have taken greater care to prevent access.



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## INCIDENT SCENARIO TWO

A police officer was attending a suspected break in to a garage which occurred at night. While walking around the rear of the premises, which was unlit, they tripped over the kerb and fell. As a result of the fall they injured their ankle and wrist.

Show of hands – is the garage owner liable for these injuries for failing to provide lighting in the area when the business was closed?



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Show of hands – is the garage owner liable for these injuries for failing to provide lighting in the area when the business was closed? **UNKNOWN**

The case was never brought to Court after the officer dropped their action following a public outcry. The important point to note from this is that the Police Federation were willing to fund the legal case against the garage and one wonders if they would have done so without being reasonably confident of the outcome.



# THE MAN ON A CLAPHAM OMNIBUS

How the courts make decisions can sometimes be confusing to a business owner and often, what we consider to be, “common sense” seems to be ignored.

In negligence cases the “common sense” rule is often referred to as “the opinion of a man on a Clapham Omnibus” and this concept was used by Lord Justice Greer, in the 1933 case of *Hall v. Brooklands Auto-Racing Club*, to define the standard of care a defendant must live up to in order to avoid being found negligent.

Unfortunately, it would appear from some recent decisions that this test against what the public would consider to be reasonable is being diluted with a greater burden than ever placed upon defendants to prove they have not been negligent.



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# HOW DOES YOUR LIABILITY ARISE?

As a business you have a responsibility to your employees and any other person who may be affected by your activities. You are also legally responsible for the actions of your employees acting in the course of your business. This liability arises through both common law and certain statutes, the most obvious one being the Health & Safety at Work Act 1974.

HASAWA is a very strong piece of legislation, imposing duties upon an employer to ensure they are working safely. It does so in two ways;

- Directly imposing duties of care in general terms
- Allowing Government to create Regulations which impose more specific legislative duties of care (such as Manual Handling Regulations)

All businesses must comply with Health & Safety legislation and ignorance of the law is no excuse.



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# HEALTH & SAFETY AT WORK ACT 1974

Some of the main points which HASAWA asks every business to address are:

- To provide a safe place of work with safe access & egress
- To provide safe plant & equipment
- To provide information, instruction and supervision for employees
- To ensure all employees are competent to do the tasks given to them and have adequate training
- To maintain safe and healthy working conditions

In addition to the above you must also consider risks which you create to members of the public by your actions and omissions.



# WHAT DO YOU NEED TO DO TO COMPLY?

To comply with HASAWA every business should have the following in place:

- A “Competent Person” within your organisation to advise on health & safety matters
- A health & safety policy detailing how the business will comply with its duties for health & safety
- A fire risk assessment for their premises
- Risk assessments for the “significant risks” arising during the course of their activities
- Provide suitable instruction and training for their employees and be able to prove they are competent to do their job
- Provide safe plant & equipment with appropriate personal protective equipment for any user
- Construction related activities will also require a Construction Phase Plan or Method Statement for the works undertaken



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PROVE IT?

ELENA FRY

BRODIES SOLICITORS



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## Claims defensibility – 27 November 2018

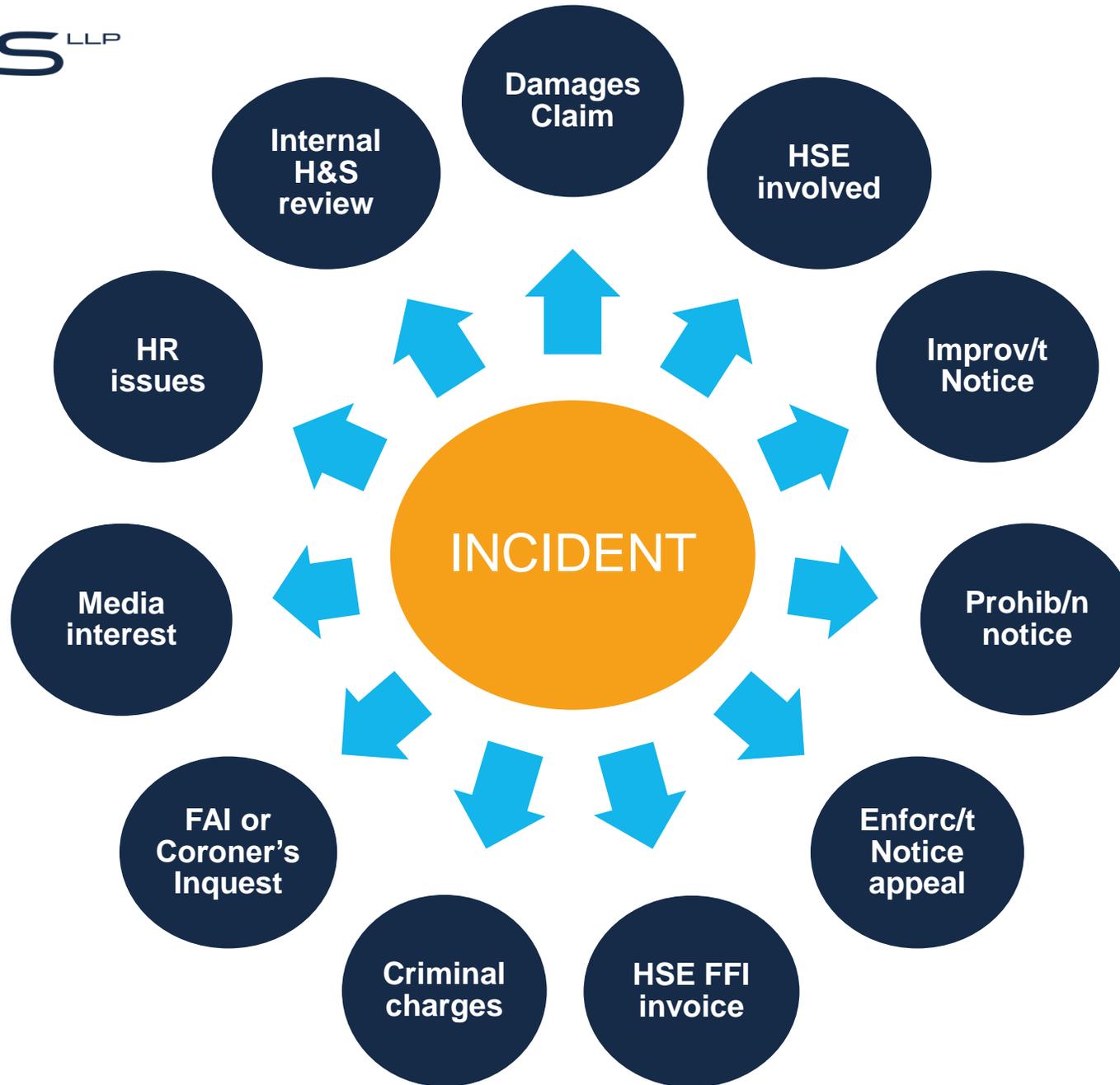
Elena Fry

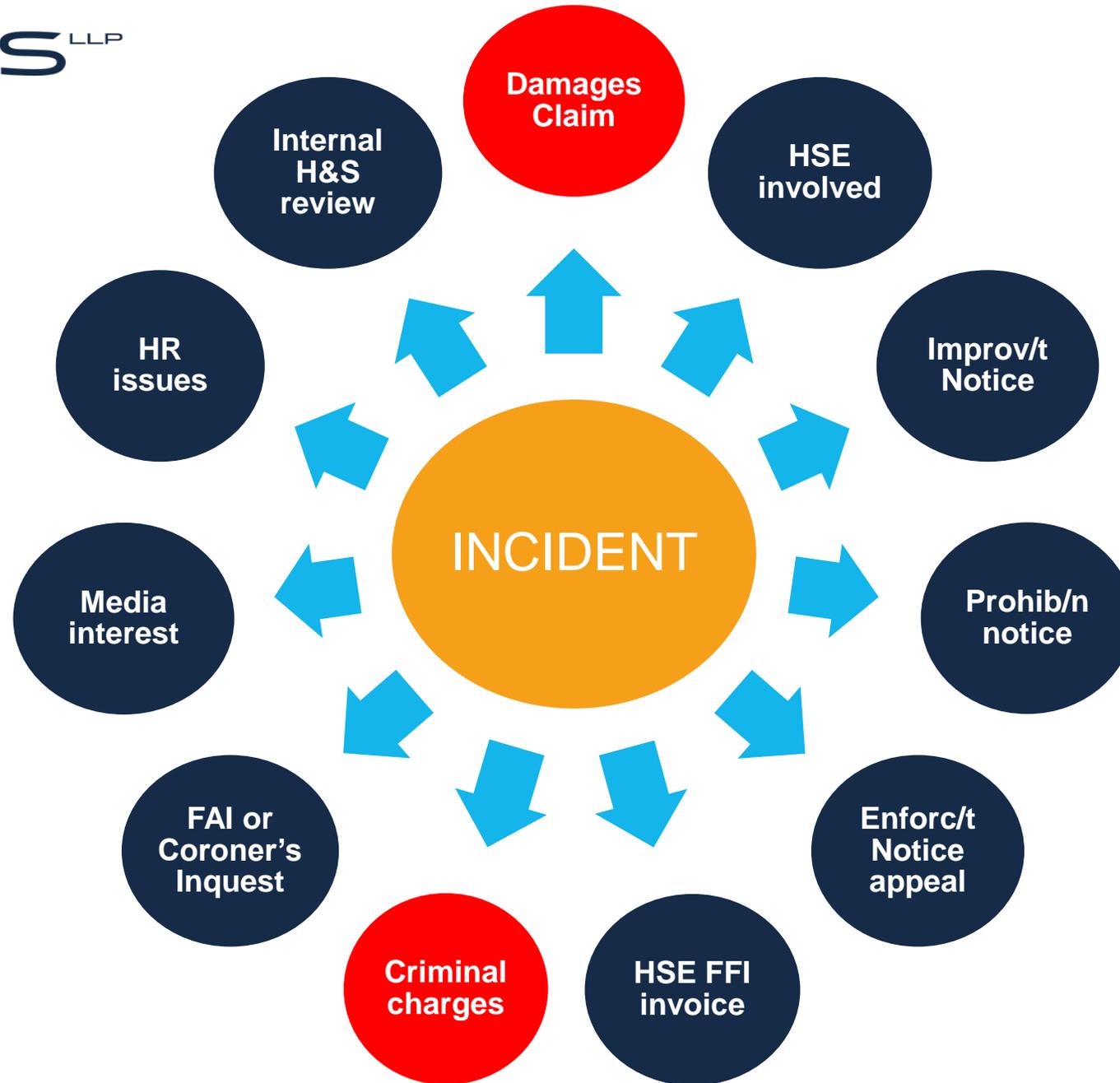
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# H & S law

Civil claims

Criminal  
prosecution

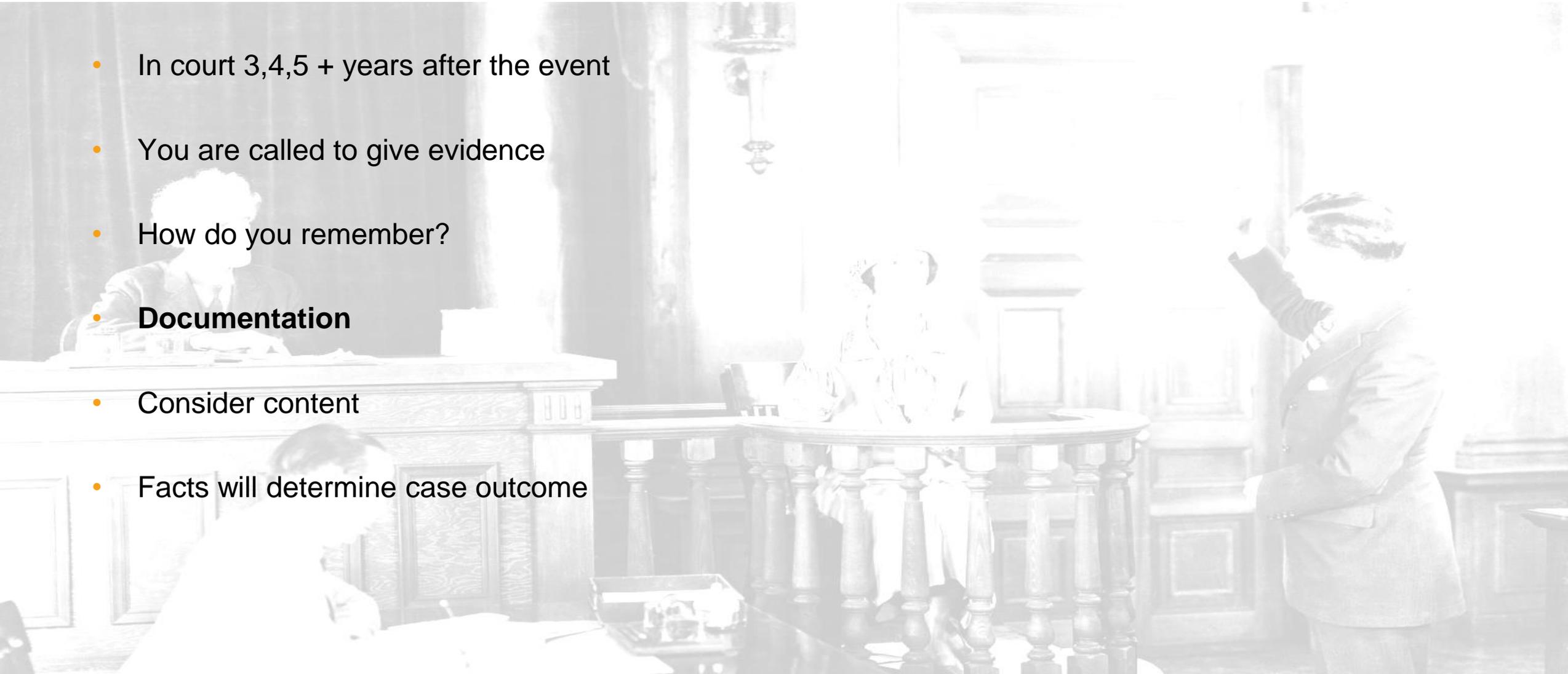


# Court process



# Court process

- In court 3,4,5 + years after the event
- You are called to give evidence
- How do you remember?
- **Documentation**
- Consider content
- Facts will determine case outcome



# Protecting your documents

Any document within your control can be requested by regulator or claimant. But when is there a legal basis to say no?

- is the request relevant to the incident which has occurred?
- is the request made proportionate?
- is the document confidential?
- is the document **privileged**?
  - legal advice privilege
  - litigation privilege

# Legal Advice Privilege

Applies to all communications between lawyer and client where legal advice is sought or given

- “lawyer” = solicitor, trainee solicitor, paralegal or legal executive
- “client”= company individuals who are authorised to seek legal advice
- “legal advice” = advice on rights, liabilities, obligations or remedies
- the purpose of the communication is crucial
- instruction to advise creates a framework to share factual information
- **must remain confidential between lawyer and client**

# Litigation Privilege

- does not apply to:
  - accident book
  - eye-witness accounts of other employees
- applies to documents prepared in contemplation of litigation
  - what is the true character of the document?
  - when was it prepared?
  - why was it prepared?
- importance of labelling documents to avoid unintended disclosure

# Privilege best practice

- identify company e/ee(s) or director(s) authorised to seek legal advice
- clear and individual request for legal advice e.g. “*I would like advice on...*”
- ask lawyer to communicate with identified person(s) only
- label all correspondence with ‘*privileged and confidential – created for the purpose of obtaining legal advice*’
- store all related communications separately and limit access
- avoid “c.c.’s”
- if circulation required, can you meet to discuss?
- following an incident, create an incident ref and put on all documents
- label all investigatory reports, statements and photographs with appropriate language ‘*privileged and confidential – created in contemplation of litigation*’
- be as factually accurate as possible
- avoid opinion or speculation on company practice

# Completing Accident Reports

- Important distinction between **accident report** and **internal incident investigation/review**
  - **Accident report** will automatically be recoverable by regulator and claimant
  - **Internal incident review** “*prepared in contemplation of litigation*” should generally not be
- Accident report or “*reports at or about the time of the accident made to the defender or anyone on their behalf by an employee present at or about the time of the accident*”
  - Stick to the facts
  - Do not include opinion

# Completing Witness Statements

- Name, age, occupation, home address, tel. no or witness and person who took statement
- Legible
- Open questions
  - Where did you fall? **not** Did you fall over the tiles?
  - When did it happen? **not** Did it happen in the morning?
  - What do you think cause you to fall? **not** Did the crack in the tiles cause you to fall?
- In witnesses own words
- Signed and dated by witness
- Declaration of truth?
- Possibly obliged to disclose – how to avoid?
  - Precognitions – statements taken by (normally) solicitor

# Completing Internal Investigation Reports

- **Generally created in contemplation of litigation – *consider if external legal counsel required***
- **Details**
  - Mechanics of accident
  - RA/MS– before/during/after
  - Photographs/CCTV
  - Electronic data (e.g. phone records)
  - Witnesses
  - Weather
  - Equipment – make, model, age, maintenance records
  - Training and qualifications of injured person
  - Comparator employees
- **Language**
  - Clear and non-technical
- **Consistency**
  - Across the company

# Proving it

- Documentation is your friend
- Gather all available evidence such as:
  - Signed RAMS– to prove they have been read and understood
  - Other relevant policies (e.g. lifting plan)
  - Contractual documentation
  - Emails and other digital communication
  - Accident report and contemporaneous accounts of incident from IP
  - Witness statements
  - Photographs
  - CCTV
  - Personnel and training records (including TBTs)
  - Internal investigation/incident reviews (which might attract legal/litigation privilege)
  - Other relevant evidence – N.B. fraudulent claims

## Proving it – it works...

*“In my opinion, the content of these documents fatally undermines the pursuer’s version of events as given in evidence. I accept that there was an accident, but in my opinion, it did not happen the way the pursuer said it did...”*

*The pursuer’s account of where he was in relation to the fitters is materially different from the account given in the accident reports.*

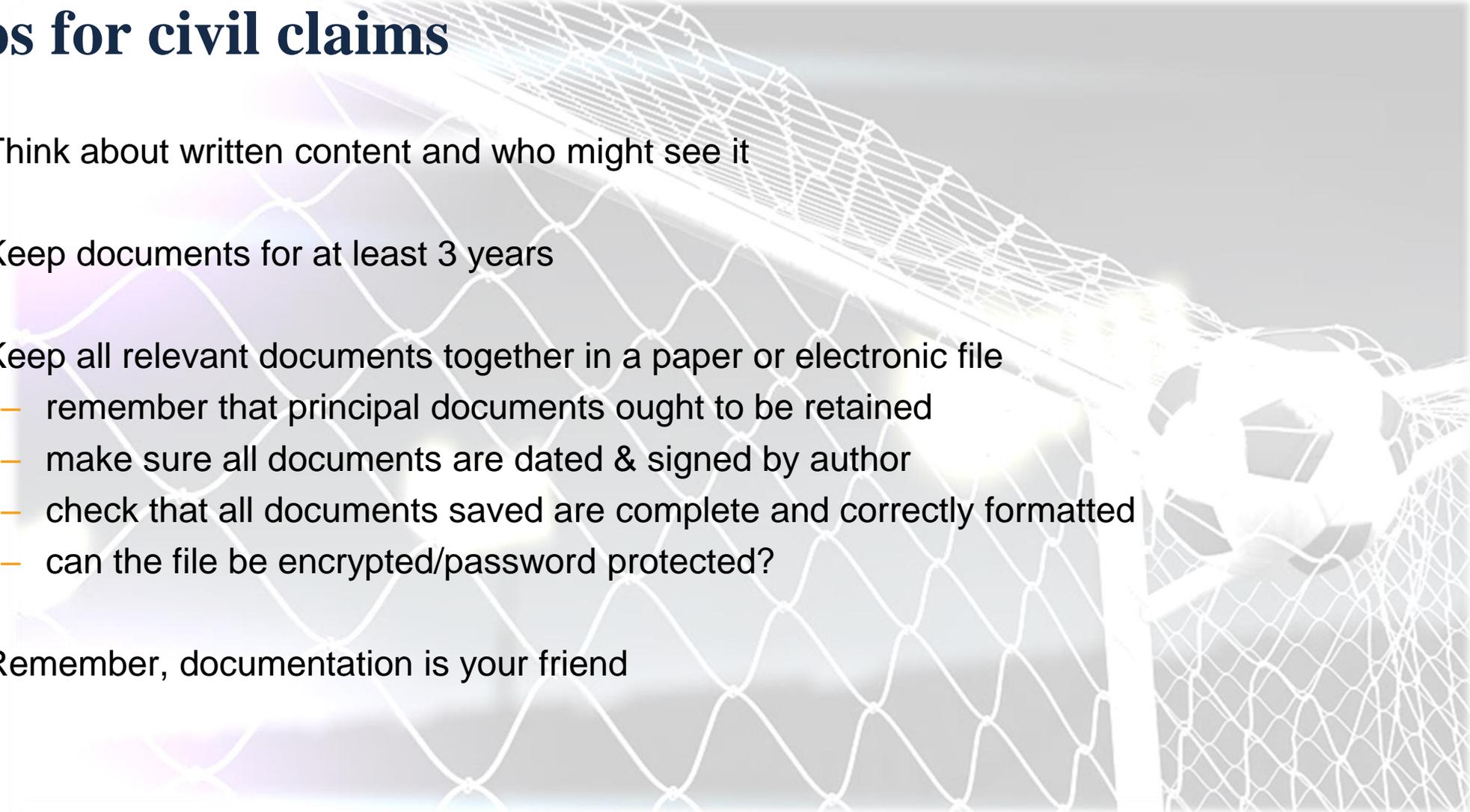
*The result is that the pursuer has not proved that the accident happened in the way averred: thus he has failed to prove this part of his factual case...*

*In my opinion, that is sufficient to allow me to dispose of the case by granting decree of absolvitor in favour of the defenders.”*



# Tips for civil claims

- Think about written content and who might see it
- Keep documents for at least 3 years
- Keep all relevant documents together in a paper or electronic file
  - remember that principal documents ought to be retained
  - make sure all documents are dated & signed by author
  - check that all documents saved are complete and correctly formatted
  - can the file be encrypted/password protected?
- Remember, documentation is your friend



# Summary

- **Establish the factual matrix - capture the facts – who, what , why, when, how**
- Contemporaneous written evidence (including policies and procedures) strengthens witness testimony and their credibility/reliability
- Helps 1) initial assessment of liability by your insurer and 2) lawyer defend case (if you decide to do that)
- You want your evidence to be preferred
- Outcome affects business and personal reputation and direct/indirect costs to business
- Direct costs - Absences (actual and for case preparation); Fines; FFI costs; Increasing insurance premiums
- Indirect costs- Lost management time; Impact on staff ; Reputational damage affecting future work streams

# HOW CAN WE HELP?

GS Group are the only Independent Insurance Broker in Scotland with their own in house Risk Management service.

Our service is totally bespoke to each business – the first thing we do is assess what health & safety systems you currently have and how we can help. If you don't need us we will tell you so.

If you do need us, we will work with you and your employees, becoming part of your business & removing the need for you to have a competent person within your organisation

We can provide you with a health & safety management system which will meet the needs of your business and will give you the tools to maintain a safe system of work



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# WHAT IF THINGS GO WRONG?

Bearing in mind what we said at the start – even the best can still suffer accidents, we provide assistance in the event something does go wrong.

We will carry out incident investigations working with your employees, your Insurers and any enforcing authority to identify what went wrong so we can prevent it from happening again.

We will assist you in any enforcing authority investigation – we'll be with you every step of the way.

We can, in conjunction with your Insurer, ensure you have the best legal advice available to allow you to defend any action brought against you.



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# WHY DO INSURERS SETTLE?

Quite often claims will be settled by Insurers without going to court. They do so for a number of reasons, including:

- Cost – it may be more cost effective to pay out a small claim rather than go to the expense of defending it
- Time – when defending an action the business may need to have their employees attend court to give evidence. Can the business afford to lose employees for 2-3 days? Insurers will discuss this with you and together you may decide to settle out of court.
- Lack of proof – while you may think the claimant has no case, can you prove it?
- You are liable – if you are responsible for an accident then its better to agree settlement early to reduce the costs for legal representation

Ultimately the decision will be made by the Insurer to settle on the most cost effective basis.



# FINAL THOUGHTS – SOME DO'S & DON'TS

Do take action – if today has made you think about your own business please take some action to resolve any issues. Get advice, and get the right advice.

Do make sure you have all your required policies, procedures and risk assessments in place.

Do make sure your employees are adequately trained. Remember as well as telling them what to do – make sure you tell them what not to do as well.

Do make sure your premises, plant and equipment are all safe and properly maintained.

Don't assume it's common sense – common sense can be surprisingly uncommon

**FINALLY – DO MAKE SURE YOU CAN PROVE IT!!**



# Any Questions?



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